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ENVIRONMENTAL LAW AND ITS IMPACT ON THE CANMET CONVEYOR BELT TEST FACILITY

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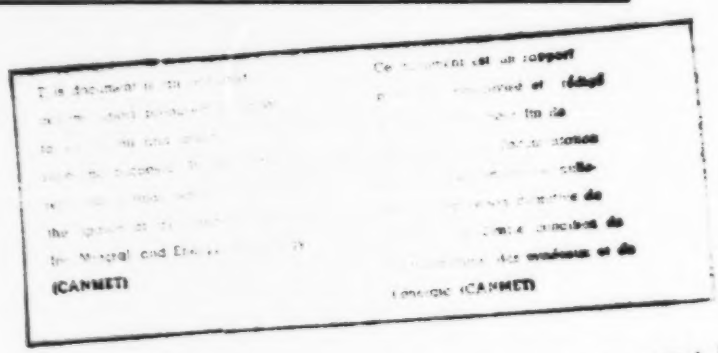

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ENVIRONMENTAL LAW AND ITS IMPACT ON THE CANMET CONVEYOR BELT TEST FACILITY

by

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ABSTRACT

In its efforts to enhance mine safety through a testing and certification program for certain mining products and applications, CANMET operates a conveyor belt test facility in which large samples of conveyor belting are burned. The test procedure determines whether the product being tested has certain minimum levels of fire performance as stated in the test specification.

Products which comply with the test may be certified under a Departmental certification program and may be permitted, by the authority having jurisdiction, to be used in underground mines in Canada. A byproduct from this test is copious amounts of odourous smoke, which is discharged to the atmosphere. This discharge renders the CANMET facility, its operators and management subject to the provisions of the Ontario Environmental Protection Act as well as the soon to be legislated Canadian Environmental Protection Act.

This paper provides information as to how the law is applied to the provisions of the Act, and how the law can be expected to impact on the CANMET conveyor belt test facility.

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Key Words: environmental law; liability; conveyor belting; flame testing.

RÉPERCUSSIONS DE LA LOI SUR LA PROTECTION DE L'ENVIRONNEMENT SUR L'INSTALLATION D'ESSAI DE BANDES TRANSPORTEUSES

par

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RÉSUMÉ

Dans le but d'améliorer la sécurité dans les mines, CANMET a réalisé un programme de contrôle et de certification de certains produits et de certaines applications destinés à l'exploitation minière. Une installation de contrôle des bandes transporteuses où de gros échantillons de courroies sont brûlés, a été aménagée. La méthode d'essai qui y est utilisée permet de déterminer si le produit possède le taux minimal de réfraction, conformément aux spécifications relatives aux essais.

Les produits qui sont conformes aux normes élaborées pour les essais peuvent être certifiés en vertu du Programme de certification du Ministère et leur utilisation autorisée légalement dans les mines souterraines au Canada. Les essais dégagent une quantité considérable de fumée malodorante qui se répand dans l'atmosphère. L'installation de CANMET, les employés qui y sont affectés ainsi que la gestion, sont responsables des dégagements de fumée en vertu de la Loi ontarienne sur la protection environnementale de même que de la Loi canadienne sur la protection de l'environnement qui entrera en vigueur sous peu.

Dans le présent document, les auteurs expliquent de quelle manière la loi sera applicable selon les dispositions légales et ses répercussions possibles sur l'installation de contrôle des bandes transporteuses de CANMET.

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Mots-clé : Loi sur la protection de l'environnement, responsabilité, bandes transporteuses, essai à la flamme.

INTRODUCTION

This report updates CANMET personnel on the information provided to the writer at the Environmental Law conference held in Toronto on February 2, 1988. This report also makes practical application of the information obtained to the CANMET conveyor belt test facility, although the application of this information could have a much broader scope. The information in this report was drawn from a voluminous conference document containing papers written by the speakers as well as additional comments given during the individual addresses.

There were approximately 200 attendees, mostly from the private sector, with many lawyers and senior management people present.

The following were the main points of the conference:

1) How to deal with the MOE (Ontario Ministry of the Environment) when they come to call;
2) The Environmental Audit as a tool for prosecution avoidance, and the inherent dangers of having an Environmental Audit;
3) The structure of the MOE, its approaches, its activities, its personnel, and its future in view of the impending federal legislation;
4) The impact of new federal legislation, not yet passed by Parliament: "The Canadian Environmental Protection Act".

This document discusses first the Legislation (Federal

and Provincial), then the MOE and the process of dealing with the MOE, then the Environmental Audit, and lastly how the CANMET conveyor belt test facility fits into the equation in light of this information.

A. THE LEGISLATION

Generators of pollution in Ontario now generally must comply with the requirements of the Ontario Environmental Protection Act. Even Federal agencies, in the absence of any federal legislation, are looking toward compliance with the Ontario regulations, as "good corporate citizens". In general, the legislation is required, as there are "bad actors" in the province who do wilfully generate pollution. Also, because environmental issues have taken such a prominent position in the media, governments were forced into the position of having to be seen to respond to the public outcry on environmental issues.

However, according to R. Cotton, a lawyer specializing in environmental issues the situation is not clear cut:

> "It should be noted that there is one significant difficulty in Canada with the use of "compliance" as a goal for the assessment of environmental matters. In the United States, it is a relatively straightforward matter, in most cases, to assess whether a company's emissions, for example, exceed the specific standards provided in the United States. In Canada, specific standards are the exception rather than the rule; Canada more commonly operates on a system of guidelines, complaints, and Ministerial discretion. Consequently, it is a difficult task to assess compliance in Canada. **An example is a facility which emits odours;** under Canadian law, any odour which causes or may cause a person discomfort may result in prosecution, abatement orders, and so on. In a facility which regularly emits odours as part of its operations, it is difficult to assess whether the facility "complies" or does not "comply" - a single complaint can lead to Ministry action, but it may not. While an environmental audit process, procedures for environmental managers officers or directors, and so on, may identify and deal with problems, it may not be possible to

> rule with certainty on a facility's compliance with Canadian environmental laws and regulations." (emphasis by G. Lobay)

Having rather vague and discretionary legislation has not prevented the enforcement division of the MOE from prosecution of offenders, however. This will be discussed later in the MOE section.

The Ontario Environmental Protection Act does make one important provision, in that the Act is to be applied equally across all regions of the Province, to polluters wherever they may be located, and however large or small they may be.

The Canadian Environmental Protection Act (CEPA), or Bill C-74, has been through its second reading and is now before a Legislative Committee of the Commons. It is expected to be enacted late in 1988. According to T.R. Lederer, another lawyer specializing in environmental law,

> "...the federal government will assume a broader and more assertive role in environmental matters than has previously existed. The comprehensive nature and wide scope of CEPA, together with fines of $1,000,000 per day and **jail terms for corporate officers and directors,** may serve to ensure that environmental considerations will play a more significant role in corporate decision-making."
> (emphasis by G. Lobay)

The major provisions of CEPA **specifically include the federal government,** and include federal departments, agencies, Crown corporations, works, undertakings, and land falling within the legislative authority of Parliament. Some grappling between the Provinces and the federal government can be expected over jurisdictional matters, as in many cases there is no clear distinction as to which entity should prevail. In terms of constitutional jurisdiction, CEPA is framed as a criminal

statute, and as such would be clearly within the federal ambit, since all criminal legislation constitutionally is clearly spelled out as being under federal jurisdiction.

To further illustrate that CEPA includes federal works, M. Weese of Environment Canada states, in relation to what form of enforcement action might be taken:

> "For instance, warnings will be used when inspectors or investigation specialists believe that a violation of the act has occurred or is continuing to occur, and when the degree of harm or potential harm to the environment, human life or health appears to be minimal. Whether the company, individual or **government agency** has a history of good compliance with the act and whether they have made reasonable efforts to remedy the consequences of the offence or future offences also enter into consideration. When warnings are not heeded, enforcement officials will take further action."

CEPA does outline a framework for greater consultation between the federal and provincial governments in these matters. The provisions of CEPA have been designed to represent minimum national standards. Again, according to Lederer,

> "CEPA regulations will prevail over provincial regulations unless a province can convince the federal government that the provincial regulations are as strong as or stronger than the federal ones, and that the province is enforcing them. If this is the case, the federal minister will enter into an agreement with the province for the purpose of ensuring the enforcement of the provincial provisions, and an order will be passed stating that the CEPA regulation does not apply in that province."

Both pieces of legislation have the following similarities:

- several provisions whereby inspectors are enabled to access trade secrets (i.e. product formulations) but not disclose this information publicly; however, several exemptions to the rules exist whereby trade secrets can be transmitted to others, and it has yet to be established in the courts

whether trade secrets can be accessed through the provisions of the Access to Information Act.

- inspectors are to provide information and advice regarding compliance, carry out inspections, conduct investigations to obtain evidence of violations, and direct that corrective measures be taken;
- inspectors will be able to seize and detain anything in connection with an investigation, issue warnings, negotiate compliance guarantees, issue tickets (similar to traffic tickets) for procedural and administrative violations, and recommend prosecutions;
- the Minister may ask the court for an injunction to stop or prevent a violation of the legislation;
- any person may initiate an investigation;
- severe financial penalties as well as jail terms are mandated;
- where a corporation commits an offence, **any officer, director or agent** of the corporation who **directed, authorized, assented to, acquiesced in or participated** in the commission of the offence **is considered a party to the offence and is open to prosecution;** (emphasis by G. Lobay)
- in addition to the above penalties, additional punitive actions may be ordered by the court, including prohibition of repetition of the offence, remedy of harm to the environment, stripping the offender of any profits obtained as a result of the offence, directing the offender to perform research, etc.;

Lederer also recommends that full inquiries ought to be

made to determine potential liability, no matter how remote the possibility. Other suggestions were to establish pollution monitoring and prevention systems, to ensure the capability exists to respond rapidly to spills or other environmental damage, to design a reporting system, and to maintain an open and co-operative relationship with government officials.

Lastly, according to M. Weese of Environment Canada, enforcement officials **will always prosecute** when any one of the following conditions is met (referring to CEPA):

- there is death or bodily harm to a person;
- there is serious risk or harm to the environment, human life, or health;
- the alleged violator knowingly provided false or misleading information, or made a false or misleading test of a substance in purported compliance with the act;
- the alleged violator interfered with a substance seized by an inspector;
- the alleged violator concealed or attempted to conceal information after the offence occurred;
- the alleged violator did not take all reasonable measures to comply with a ministerial order or with direction by an inspector.

The term "...all reasonable measures..." is not defined and must be subject to interpretation by Environment Canada inspectors or officials.

Turning to recent developments concerning the Ontario Regulations, officials from the Ontario Ministry of the Environment are now engaging in public forums to discuss proposed

changes to the air pollution Regulations. One interesting proposal is to treat small generators of air pollution on a different basis from the larger polluters, and to treat "experimental installations" on a case-by-case basis. The revised Regulations are expected to be promulgated late in 1988.

B. THE ONTARIO MINISTRY OF THE ENVIRONMENT

The Ministry's Investigations and Enforcement Branch, which has the responsibility of enforcing the provisions of the Environmental Protection Act, now consists of 66 individuals located in 17 offices across the province. This branch is responsible for enforcement actions concerning violations of the Act, and is separated from the activities of the Abatement Branch which in effect monitors known and suspected polluters, as well as offering advice regarding pollution abatement to "clients".

The relationship between the Abatement and Enforcement Branches is described by Mr. A. Douglas, Director of the Enforcement Branch as follows:

> "The Branch work load is separated from the Ministry's Abatement activity by the use of an occurrence reporting system, this system involves a paper record of a suspected violation which is then reviewed in co-operation with the Abatement staff and the local IEB (Investigations and Enforcement Branch) district supervisor. Based on the recommendation, after evaluating the circumstances surrounding the incident, a decision is made on the appropriate response. This response can be further abatement activity, through the use of control orders or some other appropriate corrective action, or the matter could be assigned to the Investigation and Enforcement Branch for investigation and possible prosecution.
> In the first full year of operation of the new branch we launched over 1,100 investigations. About 25 percent of these, a total of 260 cases, were recommended for prosecution in the period April 1, 1986 to March 31, 1987. There has been a sharp increase in charges laid by the

Ministry when compared to previous years."

The role of the enforcement branch was further clarified by the Assistant Director of Enforcement, Mr. R. Clark, who stated that the role of the Branch:

> "...is not to negotiate or to consult with polluters - our role is to act upon breaches of environmental laws and to take the appropriate action."

Mr. R. Cotton (lawyer - paper A), in his address, stated that in recent times, enforcement is taking over as the only policy for the MOE whereas in previous years, more negotiation was usual. To illustrate, Mr. Cotton stated that it was his understanding that every pulp and paper company in Ontario has been charged under the provisions of the EPA, as well as every major chemical company in Ontario. Mr. Cotton stated that the courts will be tied up for years to come with litigation of this sort. Further, the work load of the Branch is evidencing itself by such things as response times for routine approvals of new facilities taking on the order of at least 6 to 12 months, and unanswered correspondence.

In recent years, significant increases in penalties have been observed where corporations have been sentenced as a result of violations of the Act. Directors of corporations have also been charged, under the provisions of the clause of the Ontario EPA which in part states:

> "...an act or thing done or admitted to be done by an officer, official, employee, or agent of the corporation in the course of his or her employment or in the exercise of his or her powers or the performance of his or her duties shall be deemed also an act or thing done or admitted to be done by the corporation."

Mr. R. Rolls, another lawyer specializing in environmental law states that because every director or official of a corporation "has a duty to take all reasonable care to prevent the corporation" (quoting from the EPA) from committing an offence contrary to the EPA, a failure to carry out this duty could result in liability.

Further, Mr. Rolls cited cases where even though the Director of a corporation issued instructions to employees to take pollution control measures, and these measures through negligence or for some other reason were not followed by the employee and resulted in violations, the Director was nevertheless held liable. A specific example involved a case in British Columbia where a worker was to fill a tank only in the presence of another worker. The worker chose for some reason not to follow these instructions and proceded to fill the tank alone. The worker was then distracted by the telephone or some other thing, which resulted in an overflowing tank and ensuing pollution. The Director of the company was charged in this case for not exercising "due diligence".

What is "due diligence"? Mr. B. Taylor cites a paper by Janette MacDonald which provides a list of factors which the courts have utilized to serve as evidence of due diligence:

- corporate policy statements endorsing compliance with the law;
- instruction of managers and supervisors of the duties and requirements of the legislation, and providing adequate staff training;
- adequacy of the staff to perform the function required by

the Act;

- adequacy and accessibility of supplies enabling compliance;
- operating manuals;
- programs which show regular and continuous compliance checks, supervision, and written reports to evidence this;
- compliance with industry standards as a minimum;
- continuous updates, notices, reminders; and
- documentation recording to system and events.

Before the Enforcement Branch embarks on the prosecution route, the following factors are taken into consideration (according to the Assistant Director of the Branch):

- has the person made substantive efforts to prevent or to reduce the pollution?
- has there been a history of violations or non-compliance in the past?
- was the discharge deliberate or because of negligence?
- have warnings of the Ministry gone unheeded?
- was there concealment of information about the pollution or the incident?
- was false information about the incident provided?
- was there real or potential harm done to any person, property or thing?

The following extract from Mr. Clark's paper provides information on Branch personnel, and the approach "clients" of the Branch can expect:

> "It would also be of interest to you that several investigators are ex-police officers who have specialized in corporate crime investigations in their former careers. Our investigators will be proficient, polite, knowledgeable, and

persistent in their pursuit of evidence. The investigator will always be sensitive to the rights of those under investigation. This is a matter or courtesy and professional pride in the job that we do. We also recognize that these rights are legally entrenched in Canada and must at all times be respected. No investigator will ever try to trick a suspected polluter into providing evidence. Investigators are instructed not to interfere in any way with the rights of individuals who seek advice from their solicitors. Indeed, in most cases if the person under investigation wishes, our investigators will be pleased to speak to the person's lawyer and to explain our activities. We believe that it is useful to do such things in order to lessen the probabilities of confrontation during our investigations. By maximizing the fair exchange of information and being forthright with companies we believe that the interest of the environment can best be protected."

The MOE has powers of search and seizure similar to those proposed in CEPA. The MOE can enter at any reasonable time, any building or land in order to make inquiries, and may take photographs, take copies of documents and drawings, speak to employees, take statements and perform other investigative functions. Court orders may be obtained in the case of recalcitrant individuals, as may be search warrants.

What should directors do to avoid prosecution? In his address, R. Cotton stated that directors, in an effort to comply with environmental laws and regulations and, in the event of non-compliance, minimize or avoid liability by considering the following actions:

- develop a written environmental policy, including statements to the effect that every available precaution towards ensuring that the activities of the organization do not result in unacceptable adverse effects on human health and well-being and on the environment;
- consider retaining the services of an environmental manager/director who is knowledgeable in both environmental

standards and technical matters;

- ensure that an environmental audit of the corporation's past, present and future activities is undertaken, and that an ongoing environmental audit program is in place;
- address the issue of establishing a pollution control program; an appropriate amount of time and money should be spent in determining the most efficient and economically feasible environmental control systems;
- establish an environmental protection program which would do such things as monitoring of discharge on a regular basis, and preventive programs and maintenance on pollution control equipment;
- ensure that regular environmental reports are made to the directors;
- ensure that officers report potential and actual non-compliance to the director so that appropriate actions can forthwith be directed;
- establish remedial and contingency plans in the event of equipment failures;
- ensure that staff report to the director concerns of any person, including the public, government authorities, employees, supervisors, etc.

What should officers more directly connected with the operation of the facility do to minimize liability? Again, according to Cotton, officers should:

- consult legal counsel experienced in environmental matters so as to keep abreast of all new developments in the application of the laws and regulations;

- consult regularly with all concerned staff to discuss day-to-day issues;
- implement the established environmental policy;
- ensure, in writing, that all employees are aware of their individual, as well as the company's, legal responsibilities to comply with the legislation and regulations;
- review the duties of officers to determine how these duties relate to environmental issues;
- ensure that the pollution control and environmental protection programs are in place, and working;
- ensure that environmental audits are regularly being carried out;
- ensure that training has been carried out with respect to contingency plans, normal procedures, preventive measures, etc.
- notify the director when an office cannot ensure compliance;
- make all reasonable steps to prevent non-compliance where it is believed non-compliance is taking place;
- ensure that all policies are carried out.

C. THE ENVIRONMENTAL AUDIT

An environmental audit is an in-house assessment of the impact on the environment by a facility, as well as an assessment of the anticipated repercussions on others as a result of this environmental impact. An environmental audit will provide all available pertinent data regarding pollution to management so that management can formulate a strategy which will control the activities of the organization in such a way as to:

- reduce the risk of civil liability and ensure compliance

with applicable legal requirements;

- identify poor operating and maintenance procedures at a plant;
- assess the effectiveness of existing environmental equipment;
- improve overall compliance assurance.

There was considerable discussion at the meeting regarding the sensitive nature of the environmental audit and the potential damage the information in the audit could cause to the company if the audit somehow came into the hands of inspection officials. Apparently, cases have occurred where environmental audits have been seized by inspectors and used as evidence in litigation against the offender. According to Mr. B. Taylor, another environmental lawyer:

> "At the present time if you make no attempt to protect your environmental audit, in all likelihood, the government would be delighted to seize your audit, and if appropriate, use it against you."

It was recommended in several quarters that environmental audits be protected using solicitor-client privilege.

In order for the information to be protected, it would be absolutely necessary for the solicitor to be the focal point of the environmental audit, and not the consultants and experts who actually carry out the audit.

Another suggestion was for multinational corporations to keep sensitive environmental audit information stored in corporate offices located outside the country.

D. THE CANMET CONVEYOR BELT TEST FACILITY

First, it should be clear from the preceding material that officers and directors responsible for operating, and authorizing the operation of a facility, as well as the staff operating the facility, could be personally held liable as the result of an investigation which alleged that the facility is in contravention of the provisions of the legislation. This liability is clearly spelled out in both the existing Ontario legislation, as well as in the proposed federal legislation. It is to be emphasized that the liability is of a personal nature. It is also to be emphasized that issuing instructions to employees to carry out prescribed procedures does not, in and of itself, provide an adequate defence of "due diligence" on the part of directors. Directors must also demonstrate that they have taken all reasonable measures to ensure that procedures are in fact carried out before "due diligence" can be demonstrated.

Second, both Environment Canada and the Ontario Ministry of the Environment have been privy to environmental testing conducted at the CANMET facility. According to correspondence from both these agencies, and based on this information, both are of the opinion that the CANMET facility is not operating in full compliance with the appropriate environmental legislation and regulations (the Ontario Environmental Protection Act and Regulation 308 associated with this Act).

The specific areas of contravention, based on recent tests conducted by Environment Canada, include:

- odours which have in past resulted in "discomfort to

persons" (wording of Regulation 308);

- excessive total hydrocarbons;
- excessive particulates.

Earlier testing by CEAL (Canadian Explosive Atmospheres Laboratory) staff of certain of the gases produced by the facility indicated compliance with the Ontario Regulations for those particular chemicals. These tests, however, did not attempt to make any evaluation of the quantities of total hydrocarbons or particulates produced, as the Laboratory was not equipped to make these measurements. Subsequent testing by Environment Canada officials for the same products confirmed the CEAL findings with respect to the originally tested gases, but did also indicate excessive production of the above indicated products.

According to discussions between CANMET management and MOE, MOE is prepared to allow CANMET to operate the facility as long as there are no complaints and as long as CANMET is attempting to correct the situation. Also, if MOE receives a complaint, they indicated they would be obligated to "investigate". The word "investigate" has special meaning under these circumstances. It means that the Ministry's Investigations and Enforcement Branch would "...not negotiate or consult with polluters...(but) act upon breaches of environmental laws and take the appropriate action...".

There is no written undertaking from MOE that in fact this will be the approach taken, nor is there any indication of what the Enforcement Branch's "appropriate action" might be in this case, should there be a complaint made. Complaints to MOE

from individuals in the Energy Research Laboratories or the Mining Research Laboratories on the Bells Corners Complex cannot be ruled out, nor can complaints from visitors to the facility be ruled out. This paper does discuss the factors that the Enforcement Branch takes into consideration before embarking on a prosecution action.

As discussed previously, the current Ontario air pollution Regulations are under review, and will result in new Regulations being issued later in 1988. The CANMET facility must be designed with a view to compliance with the anticipated new Regulations, as well as with the existing Regulations.

The situation regarding the Canadian Environmental Protection Act (CEPA), and the agency responsible for enforcement of the act, Environment Canada, is unclear at this time. It is clear that Environment Canada, through discussions with their officials, will not have the resources to meaningfully enforce CEPA when it is enacted. Also, CEPA does not address air pollution issues as clearly as does the provincial legislation. It would appear that compliance with the provincial regulations will be the necessary route for the forseeable future.

RECOMMENDATIONS

1) Clearly, all actions which indicate a policy of compliance should be carried out, as recommended in detail above. This will demonstrate "due diligence" on the part of all concerned. Officials from Environment Canada ought to be updated as events concerning the facility occur.
2) Construction of improved abatement facilities (approved by the Ministry of the Environment) ought to proceed as

quickly as possible. Toward this end, a "Request for Proposals" entitled "Development of an Emissions Control Strategy for the CANMET Conveyor belt Testing Facility" has been prepared and distributed to fourteen consultants selected from DSS (the Department of Supply and Services) inventories. The closing date of the solicitation is March 25, 1988. This document invites these consultants to assess the CANMET conveyor belt test facility, and to devise emissions control schemes which will satisfy the requirements of the Ontario Ministry of the Environment. One of the conditions of the request for proposals stipulates that the consultant must obtain MOE approval of the design which the consultant has recommended.

REFERENCES

1. Conference document from Environmental Law conference, containing the following papers and presentations:

Paper A - R. Cotton, L. Nicholls; "Minimizing Liability Under Environmental Laws and Regulations Without Triggering Prosecution".

Paper B - A. Douglas; "Environmental Enforcement in Ontario".

Paper C - Jackson, J. (Q.C.); "Fines, Penalties and Liabilities" (presentation only).

Paper D - Ferguson, C.W.; "Industry Perspective on MOE Enforcement" (presentation only).

Paper E - Lederer, T.; "The Canadian Environmental Protection Act".

Paper F - Weese, M.; " The Canadian Environmental Protection Act - Inspection, Investigation, and Enforcement

Action in Response to Violations".

Paper G - Clark, R.; "The Role and Function of an Environmental Officer".

Paper H - McCaffrey, L. (Q.C.); "When the Government Comes to Call: Procedures, Duties and Rights Under Ontario Law".

Paper I - Rolls, R.J. (Q.C.), Kennedy, M.; "A Constitutional Analysis of the Powers to Investigate Under Environmental Protection Law: What to do When the Government Comes to Call".

Paper J - Owens, M.; "Inspections, Searches and Seizures Under the Canadian Environmental Protection Act: Rights, Duties and Powers".

Paper K - Bishop, J.; "Ontario's MISA Program".

Paper L - Orr, B.; "The Experience of the Petroleum Sector with MISA".

Paper M - Budzik, P.; "Environmental Audits: Technical and Practical Aspects".

Paper N - Taylor, B.; "Environmental Audits: The Legal, Technical and Practical Issues".

Paper O - Ericson, B., Rankin, N.; "Business Transactions: Environmental Law Problems and Possible Solutions".

Paper P - MacDougall, R.; "The Environmental Expert Witness".